

DATE: July 8, 1988

TO: Councilman Roberts

FROM: City Attorney

SUBJECT: Site 428 - Proposed Residential Development
Within 75 CNEL Noise Level Contour - Potential
Acquisition Through HUD Grant

By memorandum dated April 5, 1988 (copy attached as Attachment 1 for reference), you asked the following questions regarding the City-owned site at Famosa and Nimitz Boulevards known as "Site 428":

1. Is the City precluded by any local law from granting approval for development of housing in a noise contour as loud as 75 CNEL? Is there any prohibition contained in Federal or State housing statutes?
2. Will Site 428 be legally eligible for FAA noise mitigation funds once the Port District's FAR Part 150 study is completed? Do we have the option of not developing the Site and still obtaining the same funds as would be paid by R.J.1, Inc.?

In answer to your first question, there is no applicable federal or state statute which prohibits a city from allowing residential development in a noise contour as loud as 75 CNEL. However, both the federal government through the Department of Housing and Urban Development (HUD), and the State of California through the Department of Transportation have established guidelines and standards which would, in the absence of special circumstances, preclude any HUD or state-funded housing being built in the 75 CNEL contour. While the noise element of the City's General Plan indicates that residential use of property is not generally compatible with noise levels above 65 CNEL, this does not result in a legal prohibition of such use.

The state law does require that multi-family housing in areas subject to noise over 65 CNEL be constructed with sound attenuation measures to reduce interior noise, and the City's Municipal Code section 59.5.0701 requires noise attenuation for new single family residences constructed within the 65 CNEL or greater contour line.

As you know, R.J.1, Inc., has agreed to utilize extraordinary noise insulation and attenuation devices in the proposed multi-family housing project and has also agreed to grant an avigation easement to the Unified Port District and the City.

In response to your second question, the FAA noise mitigation funds will only be available for the purposes identified in the FAR Part 150 study as priorities for mitigating noise problems. The FAR Part 150 study as presently drafted, dated May 1988, does not identify the acquisition of undeveloped land as a priority mitigation measure. It appears that the highest priorities presently identified in the plan include providing noise insulation to existing hospitals, schools and churches within the high noise contours and that the other priorities are providing noise insulation for existing residential units in the area and acquiring avigation easements in the high noise areas.

However, as you know, the City has been asked for comments on the draft FAR Part 150 study and the City Council will soon consider requesting the Port District to insert an Appendix "H" to the study to read as follows:

The City of San Diego further requests that the Port District delineate undeveloped land in the noise impacted area of Lindbergh Field, including City Site Number 428 located at Famosa and Nimitz, for purposes of possible acquisition or imposition of development restrictions by utilizing federal funding.

In the event the Port District honors the City's request and identifies the acquisition of Site 428 within its priorities for noise mitigation, such acquisition may qualify for funding through use of FAA noise mitigation funds. This matter has been discussed with Mr. Manual Acevas of the Port District, Mr. Howard Yoshioka of the Western Regional office for FAA, Don Nay, the Port Director, and with Emily Trapnell, an attorney for the FAA. All of those individuals indicated in one way or another that they felt that the acquisition of undeveloped land, especially publicly owned undeveloped land, through utilization of the limited amount of available FAA noise mitigation funds would not

seem an efficient or effective means of solving noise problems relating to Lindbergh Field. This conclusion was apparently based upon the fact that there are a large number of existing occupied buildings within the noise impacted area which could benefit from the use of the limited amount of FAA noise mitigation funds to provide noise insulation to protect existing occupants.

On the other hand, if the acquisition of the undeveloped land is included within the priorities ultimately listed in the FAR Part 150 study, and if the City Council determines to apply for noise mitigation funds for such acquisition, it appears that the

persons allocating the grant funds could, as a legal matter, grant the City's request.

Another issue is determining the amount of funds which would be paid for acquisition of Site 428 if grant funds became available. Please see the attached memorandum (Attachment 2) from Mary Manaster to Barry Collins of the Housing Commission relating to this issue. You will note that while the FAA allowable portion of the purchase price would be 80.95%, the purchase price itself would depend upon whether the site is considered to be owned by the City or by a separate and distinct legal entity from the City.

As background information, our records indicate that an approximately 3.5-acre portion of Site 428 was acquired without cost to the City as part of the original grant of Pueblo Lands, while the other approximately 1.4-acre portion was acquired with gas tax funds. If the federal government ultimately concluded that the property is owned by a separate and distinct legal entity from the City, therefore, the maximum grant amount could equal 80.95% of the fair market value of the site.

If, on the other hand, the property were considered by the FAA officials to be, in effect, owned by the City, the attached memorandum to Barry Collins from Mary Manaster indicates that the only amount qualified for payment to the City would be the City's acquisition cost which would, therefore, most likely be limited to \$236,500 representing the gas tax funded portion.

As additional background information we have also attached for reference copies of the December 23 (Attachment 3) and December 30 (Attachment 4) memoranda from this office to Barry Collins.

In conclusion, there is no legal prohibition to allowing residential development in high noise areas, however state and

local law requires appropriate noise insulation for certain types of residential units in areas within the 65 or greater CNEL noise contours. FAA noise mitigation funds may be available to acquire Site 428 if the Port District complies with the City's request to identify the site as a priority for acquisition within the FAR Part 150 study. While it appears that other higher priorities may be listed in the study for use of the FAA funds, the City would have an opportunity to apply for funding but there is no certainty that such application would be approved. If approved, the amount of funds which may be available to pay for the site is dependent upon a determination by the FAA officials as to whether the site is, in effect, owned by the City or whether the site is owned by a separate and distinct legal entity. If the site were

determined to be, in effect, owned by the City only a small portion of the fair market value of the site would reportedly be available from grant funds. If, on the other hand, a determination were made that the site is not, in effect, owned by the City, approximately 81% of the fair market value of the site could be available from grant funds.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug

Deputy City Attorney

HOV:ps:559:910.4(x043.2)

Attachments 4

ML-88-66